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From the Directors Desk



With the holidays fast approaching, I would like to take this opportunity to wish you all a happy holiday season.

This is the time of year when things get very hectic in the Commission office. Not only do we have license renewals to process, we also have around 250 broker associate licenses to process. We have our daily tasks to perform, as well. In addition, education director, Josh Ring, resigned in November to pursue another career. My current staff, consisting of Norma Schilling, Nancy Peck and Tim Buseman have all gone above and beyond the call of duty. I truly appreciate their hard work and team effort. I also appreciate the dedication of Commission Chair Loren Anderson, Vice-chair Charlie Larkin and Commission members Brian Jackson, Eileen Fischer and Dennis Eisnach. I am also grateful to legal counsel, Jim Robbennolt who has been an invaluable mentor for me during my first year of being executive director.

January 1, 2005 is the deadline for all active resident salespersons to be upgraded to a broker associate. Staff will be contacting the responsible broker of any salesperson to return that license to the Commission office where the licensee will then be placed on inactive status. This same procedure will be used if there are brokers or broker associates who have not met the continuing education requirements for renewal or are not in compliance with errors and omissions insurance. Keep in mind, if you are a responsible broker and have not met renewal requirements or do not have proof of errors and omission insurance, all the licenses in your office must be returned to the Commission office.

The Commission is anticipating an office move in 2005. Another state agency wants to move into our current location. We will notify you of our new address when we find our "new digs."

The 2005 Legislative Session is just around the corner. Be sure to watch for

bills that affect you. I guarantee there will be legislation pertinent to your profession!

The Commission is in the process of forming an auctioneer's task force. This task force will be charged with addressing current auction issues, as well as future changes in the auctioneer statutes and administrative rules. The Commission has had a home inspector task force in place for approximately a year, and it has proven to be an effective way of keeping the Commission informed of concerns regarding home inspectors and the inspections they perform.

As another year comes to an end, I hope we can all keep the holiday spiri in our hearts all year long.

DjN

A Letter From the Chairman



A PROFESSIONALLY CRAFTED TRANSACTION: I have used this phrase to depict a transaction in which the sellers have conveyed title and have driven off into a beautiful South Dakota sunset pleased and happy with the manner their real estate agent handled the transaction. That same day, the buyer husband picks up his wife and carries her across the threshold of the home they purchased, totally pleased with the agent's handling of the transaction for them. Fortunately, there are many transactions in our state that could be categorized as a "professionally-crafted transaction."

Unfortunately, not all transactions meet the standard described above, sometimes causing a complaint to be filed. Not every complaint has merit and the Commissioners are careful to watch for such situations, for as we know, not everyone can be satisfied no matter what an agent tries to do. The thinking of some

buyers and sellers is that they are not responsible for anything, much less their own decisions.

The Commission office is receiving calls from parties to real estate contracts wanting to "get out of their contract." Sometimes parties move into the "remorse" frame of mind, but other times the transaction is going so poorly that parties simply have "had it" and want out. On some occasions the contract has been written so poorly that the document simply did not express what each party was agreeing to (no meeting of the minds). Environmental hazards, fair housing guidelines, requirements for disclosure and third party requirements represent a multiplicity of forms and clauses that are required to make for "a professionally-crafted transaction." Part of a "professionally-crafted transaction" is a "paper trail" so that the parties have information in hand that documents what transpired during the transaction should a dispute arise. The State purchase agreement advises that if a purchaser and seller do not understand the contract, they should seek legal advice. As practitioners, the same advice may be appropriate.

Chairman
Loren Anderson

New Licensees

The South Dakota Real Estate Commission would like to welcome the following new licensees.

Broker

Bettmann, Frank A - Rapid City
Crawford, Michael R - Chadron, NE
Frieman, Michael R - Denver, CO
VanderTop, Gary W - Woodstock, MN

Broker Associates

Bowers, Kelso "Troy" - Pierre
Goebel, Janell L - Sioux Falls
Hamilton, Kimberly M - Spearfish
Hartog, Scott A - Aberdeen
Hayworth, Sarah A - Spearfish
Johnson, Corey L - Sioux Falls
Kindsfater, Alan L - Bell Fourche
Kussman, Randy W - Yankton
Lewis, Shawn R - Custer
Meyer, Christopher C - Sioux Falls

Nester, Roger J - Sioux Falls
Nielsen, Russell L - Sioux Falls
O Kane, Bonnie M - Brookings
Pommer, Rachel - Sioux Falls
Schmitz, Victor - Gregory
Sekellick, Melanie M - Rapid City
Shelton, Richard R - Huron
Thoelke, Jackie K - Sioux Falls
Williams, Linda S - Watertown

Reg. Home Inspector

Fogel, Stan E - Aberdeen
Norton, Perry - Hill City
Richardson, Cody J - Yankton

Res. Rental Agent

Stephens, Julie K - Sioux Falls

Salesperson

Hitzeman, Chris W - Edina, MN
Schwedler, Katherine E - Sioux City

Twelve Ways To Avoid Being Sued As A Real Estate Agent

by Stanley F. Bronstein

If you are like many real estate agents, you've had a bad experience with a lawyer at some time in your career. Believe it or not, there are many attorneys who are working to help real estate agents and their clients avoid problems, rather than causing them. However, due to the complex nature of business today, you can be fairly certain you will run into some kind of problem sooner or later. The good news is there are several things that can be done to minimize the likelihood you will ever get sued. No one can guarantee that you will never be sued, but you can greatly reduce the chances of it happening.

1. Document everything.

Professionals who do not document what they do are examples of malpractice waiting to happen. Keep a notebook that documents your transactions. Make a habit of putting your statements in writing, and then getting your clients to sign that they have received those statements. Sending e-mail or letters instead of making phone calls facilitates this, as the conversations are automatically recorded and can be more easily

referenced in the future than spoken conversation. If there is no proof of something you said or did, the opposing party can claim you misled them, didn't tell them, or possibly even lied to them. Also, the other party might misunderstand you, which leads to wasted time, arguments, loss of your deal and maybe even a lawsuit.

2. Make proper disclosures.

Some estimates indicate that at least 75 percent of all real estate lawsuits are filed by buyers, and most of those lawsuits address nondisclosure. In most states, real estate agents are required to disclose in writing to all other parties involved any information they possess that could affect the price that is being paid for the property in question. Basically, real estate agents cannot assist their clients in hiding any material or negative information about the transaction. Few real estate agents have lost their license because they disclosed negative information in their possession, but many have lost their license and/or lost a lawsuit because they did not disclose negative information in their possession.

3. Respond to consumers.

Address complaints promptly. If you do this, you can resolve most problems long before they ever turn into lawsuits. In my experience, most lawsuits are filed because someone feels their complaints were not heard. No matter who complains, the quicker you respond, the more likely you will be able to resolve the complaint before it escalates into a larger problem or lawsuit.

4. Limit your expertise to your own field.

Do not act outside your area of expertise. As real estate agents, you have to let your clients know that you are not an attorney, not a surveyor, not a title expert, and not a CPA. This problem arises when your clients want to save money and cut corners when doing their deals. All too often, as a real estate agent, your clients expect you to be able to answer all of their questions as part of the package

of services you provide to them as their agent.

One of the easiest ways you can avoid problems is to refer your clients to an expert when they have questions that are outside your area of expertise. Beginning with drafting the contract, real estate agents should recommend their clients seek the advice of a real estate attorney who can tailor the deal to their needs. Especially if the other side of the transaction is represented by an attorney, you can sell your client short if you don't help them realize the importance of seeking legal and tax advice on their deals. When you do this, you are protecting both yourself and your clients, and saving both of you from future problems and hassles. If your client is stubborn or doesn't want to spend the money, I strongly suggest that you put your recommendation in writing. That way if a problem arises later, you have the documentation to protect yourself.

5. Avoid dual agency.

This is an issue that has caused many problems for real estate licensees in the past, and it will continue to cause problems in the future, as long as real estate agents continue to act as dual agents. In most states, dual agency is allowed if consent is given in writing by both parties. However, that does not mean it's a good idea. Many sellers feel that brokers should owe them a greater duty of loyalty, as it is usually the seller who pays their commission. Buyers often misunderstand and think that since they have talked with an agent and negotiated with them, that the agent is representing them. In dual agency situations, the broker must walk a fine line between the parties, and both sides frequently wind up getting a lesser degree of loyalty than they expect. From a consumer's perspective, agents provide a lesser level of service in dual agency situations because the agent has to be fair and impartial to both sides and consequently ends up short changing them both.

6. Avoid conflicts of interest.

Put your clients' interests first. Due to the fact that real estate agents

typically do not get paid unless the deal closes, agents often find themselves in a position where their interests conflict with the interests of their client. Agents need to remember that they owe a duty of loyalty to their clients and they must put their clients' interests ahead of their own even if it means the deal might die, commissions might get cut, or closings will be delayed in order to give the parties time to solve problems.

7. **Keep deals simple.**

Overcomplicating a deal increases the risk that something will go wrong. If a deal does get complicated, bring in a professional who can help. This shifts the risk of something going wrong away from you.

8. **Be available.**

Return phone calls and e-mails promptly. I know nothing bothers a client more than getting the run around when they need to get in touch with their agent. Most of them won't hesitate to give up and start working with someone else in this type of situation.

9. **Use reminders.**

Use forms and checklists. Put together sets of forms and use checklists. These checklists will minimize the likelihood when you forget to do something which might lead to a serious problem. This will help you to keep organized records and will make it easier for you to document what you are doing.

10. **Give excellent service.**

Agents who give excellent service almost never get sued. Agents who give substandard service are a lawsuit waiting to happen. By giving excellent service, you make your client happy they did business with you, and you make them willing to do business with you again, and you make them want to send you referrals.

11. **Incorporate.**

Real estate agents should also consider becoming a professional corporation or a professional limited liability company. Though this will not keep you from getting sued, it can minimize the effect on your personal finances if you should ever get sued

and happen to lose. Additionally, there are tax benefits that can be achieved if you set up a properly structured professional corporation.

12. **Buy insurance.**

At a minimum, agents and brokers should carry some type of liability insurance, especially if they are driving people around in their cars. One thing you should do, is check with your auto insurer to make sure you are covered when you are driving people around on business trips. Also, you should consider getting professional liability insurance. This is commonly known as errors and omissions insurance.

Real estate agents are vulnerable. You are working with many different people on many different deals, and there are potential problems that can and will arise. It is vital that you do what you can to prevent problems, and protect yourself from potential lawsuits. Though no one can guarantee you will never be sued, if you are willing to make the effort, you have the power to minimize the chances of it happening.

(Stanley F. Bronstein is a real estate attorney in Scottsdale, Arizona. He has been a CPA for 17 years and a real estate attorney for 13 years. He has created many informative audio programs, which are available to real estate agents and their clients. Contact Stanley F. Bronstein at sfb@TheCPALawyer.com, or phone 480-8-CPA-LAW. More information can be found at www.TheCPALawyer.com.)

(This articles has been reprinted with permission from realtymtimes.com.)

Confusion about the Code of Ethics

The Commission office has been flooded with phone calls and e-mail messages for the past few months with licensees wondering about the Code of Ethics course requirement. Although a Code of Ethics course falls under the status of a required continuing education, the Code of Ethics course is not a course required by the Commission to be taken by a licensee.

The National Association of REALTORS® is the organization that requires its members to complete a quadrennial Code of Ethics training. If a

licensee is a REALTOR®, the licensee is required by NAR to take a new member Code of Ethics course and then a repeat course that covers ethics every four years.

The South Dakota Real Estate Commission has very little to do with the quadrennial Code of Ethics training that is required by members of NAR. The Commission does not have the ability to tell you if a course qualifies as a supplement to the quadrennial training. Along with that, the Commission does not have the ability to tell a licensee whether or not they have completed a course that qualifies for the quadrennial Code of Ethics training. If a licensee has question about a course and whether or not it qualifies for the quadrennial Code of Ethics training they should contact either their local board of REALTORS® or the South Dakota Association of REALTORS®.

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Articles by outside experts express the author's particular viewpoints. These opinions are not necessarily shared by the Commission, nor should they be mistaken for official policy. The articles are included because they may be of interest to the readers.

WHAT DUTIES CAN AN UNLICENSED ASSISTANT PERFORM?

The Commission has recently received calls regarding what unlicensed assistants may or may not do. The most common question asked was whether or not an unlicensed assistant, with no licensee present, could host an open house if the unlicensed assistant only hands out information. This constitutes hosting an open house and is considered a licensed activity.

The following list, while not exhaustive, is intended to provide guidance for brokers and salespeople who hire unlicensed personal assistants, as well as for unlicensed office personnel.

Unlicensed assistants may:

1. Deliver documents and pick up keys.
2. Answer the telephone and forward calls.
3. Secure public information from courthouses, utility districts, etc
4. Provide courier services.
5. Schedule appointments with other offices, existing clients, or customers.
6. Place signs on property.
7. Type forms for approval by licensee and supervising broker.
8. Write ads for approval of licensee and supervising broker, and place classified advertising.
9. Assemble documents for closing.
10. Hand out objective, written information on a listing.

Unlicensed assistants may not

1. Show property to prospective buyers.
2. Solicit by telephone or in person potential sellers, purchasers, tenants or landlords.
3. Answer questions on title insurance, financing or closings.
4. Host open houses for licensees or the public, or staff booths at home shows or fairs.
5. Give additional information not included in prepared written promotional material that has been distributed to the public.
6. Represent himself or herself as an agent for a real estate broker or the owner/seller of a property.

7. Negotiate or discuss the terms of a sale.
8. Be paid on the basis of real estate activity, such as a percentage of commission, or any amount based on listings, sales, etc.
9. Act as a go-between with a seller and buyer.
10. Answer questions concerning properties listed with the firm, except to confirm that the property is listed and identify the listing broker or salesperson.
11. Solicit bidders for real estate sold at auction.

Need to Check Your Continuing Education?

All licensees have the ability to check their continuing education quick report on our website:

www.state.sd.us/sdrec.

Simply go to the homepage of the Commission's website and click on the silver oval that says "For Licensees Only". You should then be prompted to enter a user name and a password. Your user name is your last name, as printed on your license, plus the last four digits of your social security number. Your password is your social security number, with no hyphens or dashes. Once you have accessed this page simply click on your name at the top of the page and your education quick report will be brought up.

ATTENTION HOME INSPECTORS!

If you are listed as a registered home inspector and have completed your 100th inspection, you may now upgrade to the status of licensed home inspector. You just need to make a written request to the Commission and submit a detailed log of the inspections you have completed. That form is

available from the Commission office or the website at:
www.state.sd.us/sdrec.

HAPPY HOLIDAYS



APPRAISER UPDATE

This section of the South Dakota Real Estate Review is the responsibility of the South Dakota Department of Revenue and Regulation Appraiser Certification Program. Articles are printed here to communicate pertinent information to those appraisers who receive this newsletter and are licensed under the Certification Program. Appraiser certification inquiries can be directed to Sherry Bren, Program Administrator, 445 East Capitol, Pierre, SD 57501, 605-773-4608

Appraiser Certification Program Advisory Council

Council members provide recommendations to the Secretary of the Department of Revenue and Regulation in the areas of program administration in order to sustain a program that is consistent with Title XI. The Council meets quarterly in public forum. See the Website for meeting information.

www.state.sd.us/appraisers

Council Term Ends, Council Term Begins

The Department extends a big thank you to Verne Hansen of Volga (Brookings) for his service on the Council. Verne has served as an appraiser member of the Council since January 1, 2001. His service on the Council has been vital and sincerely appreciated.

Tom Rysavy of Sioux Falls will be commencing his service on the Council effective January 1, 2005. The Department welcomes Tom's service on the Council. Tom will represent the appraisers' interest on the Council by providing assistance and advice in the administration of the program.

USPAP Q & A

Vol. 6, No. 11, November 2004

Question #1: My client, a federally insured financial institution, has asked me to provide a "value in use" appraisal instead of a market value appraisal. May I do this?

Question #2: I just inspected a property and found an adverse condition. I informed my client (a bank), and was told not to proceed because the client cannot lend on such property. Under USPAP, am I obligated to inform any other party, such as the city or county health department?

Answers to the above questions can be found at:

www.appraisalfoundation.org

New Licensees – November

Jeffrey D. Mutchler, State-Registered
Spearfish, SD

Announcement by the Appraiser Qualifications Board

National Examination Policy

"The AQB shall develop Uniform State Certification Examinations that will be available to multiple providers. The examinations shall be

segmented, of appropriate rigor for the credential category, and demonstrate minimum competency in the skills necessary to practice for the credential. The examinations shall be updated as necessary, as determined by the AQB, including but not limited to changes in testing policy and psychometric analyses, changes in the skills and knowledge necessary to practice, and to reflect changes in USPAP. The AQB will approve other examinations that it deems equivalent to the Uniform State Certification Examinations."

2005 Renewal – Reminder of Continuing Education Requirements

In each odd-numbered year, an applicant for renewal of a certificate must document completion of the equivalent of 28 classroom hours of instruction in approved courses or seminars during the preceding reporting period. Seven of the 28 classroom hours of instruction must be completed in the 7-hour National USPAP update course. (See ARSD 20:14:13:01) The reporting period for the next renewal cycle is October 1, 2003 through September 30, 2005.

The Appraisal Foundation's 7-hour National Uniform Standards of Professional Appraisal Practice update course is acceptable unless the secretary has determined another course to be equivalent through the Appraiser Qualifications Board course approval program.

Available Publication -- Frequently Asked Questions (FAQs)

The Appraisal Standards Board of the Appraisal Foundation provides answers to many of your USPAP questions. This publication is an excellent reference tool for appraisers, regulators and users of appraisal services. It contains over 100 commonly asked questions and answers regarding USPAP. These FAQs are opinions of the Appraisal Standards Board (ASB) and are issued to illustrate the applicability of appraisal standards in specific situations and offer advice for the resolution of appraisal issues and problems.

The FAQs are published annually in conjunction with the annual edition of USPAP. (To order, contact the Appraisal Foundation at www.appraisalfoundation.org)

Considering the departure rule as a part of the scope of work decision

By Terry Culver; Board Consultant
for the
Iowa Appraiser Board

[This article has been reprinted from the Iowa Professional License Division Newsletter, October/November/December 2004]

The Uniform Standards of Professional Appraisal Practice (USPAP) allows for departure from certain requirements of USPAP, identified as specific requirements. If the specific requirement is typical for the type of assignment, but is not

necessary to produce a credible value conclusion, the appraiser can invoke the Departure Rule. If the Departure Rule is invoked, the appraisal process becomes a Limited Appraisal Process. While this sounds simple enough, the main problem is, how does the appraiser determine whether the specific requirement is typical for the assignment and if it is necessary to produce a credible value conclusion or not?

I think this question can be readily answered if the appraiser considers departure, as a part of the scope of work decision. Departure affects a very small part of the USPAP Rules and Standards, while the scope of work decision applies to all aspects of the assignment; also a definite test for whether the scope of work decision is sufficient is contained in the USPAP development standards for real property appraisal. USPAP states that the scope of work decision is sufficient when it is consistent with:

1. the expectations of participants in the market for the same or similar appraisal services; and
2. what the appraiser's peers' actions would be in performing the same or a similar assignment in compliance with USPAP

If the appraiser approaches the question of whether departure is appropriate, from this view point, the question becomes; if I leave out this specific requirement of USPAP, will the scope of work be sufficient for this type of appraisal assignment based on the criteria above? By looking at the whole appraisal process, both development of the assignment and the reporting of the conclusions reached, the appraiser is more likely to avoid errors in using departure.

In reviewing appraisal reports I often see reports that identify the process as being a **Limited Appraisal Process**, when in fact it is a **Complete Appraisal Process**. The following examples illustrate this:

- A. The appraiser is asked to complete an assignment using the 2055 residential form, which does not have an area for either the Cost or Income Approach to be developed and is identified as a Limited Appraisal. The appraiser has commented on and explained, in the report, that the market place is indicating buyers do not rely heavily on the Cost Approach for their purchase decisions and that the typical buyer is also not relying on the value indication by the Income Approach as a basis for their purchase decision and there is no active investor market.

The requirements for a **Complete Appraisal Process** have been met, by the above disclosures; departure is not necessary and the report would not need to contain a Departure Section. On the other hand, if the appraiser does not provide any comments on the reasons for not developing the Cost and Income Approaches, then the Departure Rule would be in effect and the reasons for not developing or considering the Cost and Income Approaches would need to be identified and explained in the Departure Section in the report as required by Standard Rule 2-2(a)(b)(c), (xi).

Remember, the decision to invoke the Departure Rule is the appraiser's, not the clients; the appraiser is ultimately responsible for the use of the Departure Rule and the scope of work decision.

- B. The appraiser is asked to complete an assignment using the 2055 residential form. The subject property is a 3 year old, townhouse style, single family dwelling. There is an active investor market, with several of the units in the project, tenant occupied. It would appear that both the Cost and Income Approaches would be applicable for this assignment.

In this example the Departure Rule would not be applicable and departure would not be allowed as both approaches to value would be reliable indicators of value and would be necessary to produce a credible appraisal. The scope of work decision would not be sufficient if the two approaches were ignored or not developed. This would be a **Complete Appraisal Process** and should not be identified as being a **Limited Appraisal**.

- C. The appraiser is asked to complete a URAR form report for an assignment, involving a 50 year old, single family, dwelling; in a market area where few houses are tenant occupied and there is no active investor market.

The appraiser explains in the report, that the Cost Approach is not a reliable indicator of value, due to the difficulty in determining the accrued depreciation because of the age of the subject property. The Income Approach was not developed, as there is not an active rental or investor market for similar property. The appraiser then identifies the appraisal as being a Limited Appraisal and that the Departure Rule is applicable, because the

Cost and Income Approaches were not developed.

The appraisal process performed for this assignment meets the requirements of USPAP for a **Complete Appraisal Process**, based on the disclosures and explanations made by the appraiser in the report concerning the two approaches. Standard 1, section 1-4, only requires the appraiser to consider which approaches to value are applicable and required by the scope of work decision for the appraisal assignment.

In conclusion, if departure is considered to be part of the scope of work decision, the appraiser will only have to ask, is the scope of work sufficient for this assignment?

Review of Cases as of November 9, 2004

For the period January 1, 2004 through November 9, 2004 there have been 11 upgrade applications, one (1) new application claiming experience, and 12 complaints submitted to the Department.

Upgrades – 7 upgrades issued; two (2) pending agreed dispositions; and two (2) cases pending.

New Applications – 1 pending agreed disposition.

Complaints – 5 settled by agreement; four (4) dismissed; and three (3) pending;

